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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 164

SAM A. WILSON,

Petitioner,

vs.

JOHN N. THELEN,

Respondent.

PETITIONER'S REPLY BRIEF

I.

The notice of the filing of the petition and copy thereof, together with the record, was served upon respondent Thelen by delivering a copy thereof to his counsel, George E. Hurd, on July 18th, 1940, as shown by the return thereof on file herein.

Rule 38

Respondent contends that Buscher, who claims an interest in the land, ought to have been made a party to this proceeding, and that notice of the filing of the petition should have been served upon him.

Attention is called to the fact that Mr. Buscher appeared in the case by filing an answer to the complaint in intervention of one McKnight. This complaint in intervention was subsequently dismissed and the complaint withdrawn. Mr. Buscher did not become a party to the action either upon order of the Court or upon his own application in the manner prescribed by the statutes of Montana, nor was he, under the Statute, a necessary party.

Revised Code of Montana, Sections 9078, 9081, 9083, 9085, *and* 9090.

Furthermore, it should be borne in mind that such interest as Mr. Buscher may have was obtained through this respondent, and that he claims a one-half interest in the land. This interest would not be affected by the decree sought by this petitioner. Petitioner claims a one-third interest. Therefore it would leave the interest of Mr. Buscher undisturbed and he is not therefore a necessary party to the proceeding and cannot be adversely affected by a judgment in favor of petitioner.

R. C. M. Sec. 9085.

No judgment is prayed for against Buscher, and no judgment could be entered against him.

The cases cited by counsel cover appeals by defendants. Much stress is put upon the rule laid down in the case of Hartford Accident & Indemnity Company vs. Bunn, 285 U. S. 169, 76 L. Ed., 685, and cases there cited, all of which affect the right of appeal by defendants against whom judgment was entered. Further, these decisions were rendered prior to the adoption of Rule 48, which appears to have become effective February 27th, 1939. This rule appears to permit an appeal in the manner taken here.

If there is any reason why Mr. Buscher is not a party to this appeal or should be made a party, petitioner consents to an order bringing him in.

II.

With respect to the decree of the United States District Court for Wyoming not being effective to award petitioner title to the lands involved herein in Toole County, Montana, counsel cites several cases which would seem to support this contention. However, a careful reading of these cases, particularly Carpenter vs. Strange, 141 U. S. 87 shows that the judgments in the foreign courts were not received as res adjudicata under the general rule that an action to determine title to lands is a local action. The decisions excluding such judgments were not based upon the exception to this general rule, that is, where

fraud, contract or trust is involved and the title to lands is an incident to a determination of the other issues the Court will take jurisdiction. This exception to the rule is frequently quoted in the cases cited.

While the contract sued upon in Wyoming was not a contract entered into with respondent Thelen, yet it was made between Wilson and Ferdig, the latter of whom conveyed the lands to the Ferdig Oil Company through whom respondent claims title. He is therefore in privity with Ferdig, one of the parties to the contract sued upon in the Wyoming Court.

Respondent's title, as heretofore stated, is based upon an alleged purchase of a tax assignment certificate and the purchase at a decretal sale. The record shows that at the time of acquiring the tax assignment certificates Thelen was acting as attorney for the Ferdig Oil Company and was the Vice-President of the Yellowstone Petroleum Corporation, the owner of eighty-five per cent of the Company's stock; (Tr. 298-299) that Thelen undertook to acquire the tax assignment for the protection of the Company and the stockholders. This was done at the instance of the president, Mr. F. J. Buscher. (Tr. 288).

Mr. Thelen testified as follows:

> "Another reason was that I wanted to protect the Ferdig Oil Company, that I might be able to get my money from it. Another reason was that they were trying to reorganize and raise money with which to put the Ferdig Oil Company on its feet, and of course I knew if they could do that I had a chance of getting my money out of it. I protected Ferdig and Ferdig Oil Company for years with the hope that we might be able to put this thing over and everybody would get their money, and I was assured by Mr. Buscher, he was in conference with the stockholders that something might be done so that everyone would be protected." (Tr. 311 and 312).

> "I remember I came up here with Mr. Buscher, we went into the matter to see if there could not be some arrange-

ment made whereby these taxes could be strung along, so that they could be paid. I remember about that time that the Oil Well Suit, or the suit had been filed, and if it had not been for that, as my memory now goes, we might have been able to put that over with the Commissioners, but there was this suit, this stuff was growing, and they said that they wanted their money (taxes due).

Q. That is, you were appearing on behalf of the Ferdig Oil Company and for them at that time?

A. Yes, I wanted to give them a chance to get these bills paid off." (Tr. 363-364).

At a meeting of the stockholders on June 9, 1931, at Cody, Mr. Buscher told the stockholders that under the arrangement with Mr. Thelen they could reimburse him and get their money back.

"If he got his money out that was all he wanted."

"He made it (this statement) to a bunch of us down there after the meeting in Cody. This was on April 2nd, 1931." (Tr. 480-481).

It appears from the record, (Tr. 466-480), that there was received by Mr. Thelen between May and December, 1931, the sum of $13,873.00 or some four thousand dollars more than was paid for his tax assignments.

It further appears on Exhibits 49, 50 and 51 (Tr. 373-378) 56 and 56-a (Tr. 428) 67 and 67-a (Tr. 558), that respondent paid the sum of $9,100 for the tax assignment affecting personal property and $1030.57 for the assignments affecting a portion of leasehold interests here involved: that the southwest quarter of the southwest quarter of Section 29, Township 35, Range 1 West, part of the land in question, was not involved in the tax assignment certificate. Furthermore, no title can be based on the tax assignment certificates.

State vs. Austin, 91 *Mont.* 76, 5 *Pac.* (2*nd*) 562.

Anderson vs. Mace, 99 *Mont.* 421, 45 *Pac.* (2*nd*) 771.

This leaves the claim of respondent Thelen based upon the decretal sale alone, and under the law of Montana, such a sale vests in the purchaser only such interest as was owned by the judgment debtor.

R. C. M. 1935, *Sec.* 9441.

Hamilton vs. Hamilton, 51 *Mont.* 509, 154 *Pac.* 717,

Chumasero vs. Vial, 3 *Mont.* 376,

Staffacher vs. Great Falls P. S. Co., 99 *Mont.* 324, 43 *Pac.* (2*nd*) 647,

R. C. M. 1935, *Sec.* 8375,

Cheadle vs. Bardwell, 92 *Mont.* 222, 26 *Pac.* (2*nd*) 336.

This purchase or acquisition of the title by Mr. Thelen was with the knowledge of the claims of petitioner. The trial court found that Mr. Thelen had notice of the pendency of plaintiff's action in Wyoming, but had no notice that plaintiff asserted any claim or title to the lands involved (Tr. 114). The Supreme Court of the State of Montana, however, reversed this finding, saying—

> "It is contended that when Thelen purchased the property of the Ferdig Oil Company at decretal sale, he knew of plaintiff's claim to a one-third interest therein by virtue of the fact that he was a party to the Wyoming suit and entered an appearance therein. That Thelen knew of this claim by plaintiff must be conceded, and the trial court's finding to the contrary was incorrect." (Tr. 678).

III.

Counsel contends that there is no Federal question involved herein and that title is based upon delinquent tax certificates and the Oil Well Supply Company's decretal sale, and cites several cases on page 16 to the effect that courts do not have jurisdiction to render a decree establishing title to land in another state.

Counsel again fails to distinguish between cases establishing the fact of a contract, fraud or trust which gives rise to the title to lands in another state and decrees which create the right or title. Illustrative of this point is Fall vs. Estin, 215 U. S. 1, where a decree in Washington in a divorce proceeding vested in the wife title to lands in Nebraska. The court in Nebraska held that the Washington court was without jurisdiction over the lands in Nebraska.

The effect claimed for the proceedings in Wyoming is the establishment of the contract between petitioner and Ferdig and the Ferdig Oil Company through whom respondent claims title.

It may be stated incidentally in passing that petitioner's contention that there was a contract as established in Wyoming, was confirmed by the testimony of Lowe and a letter which was introduced in evidence, Exhibit 71, on page 580.

IV.

The question of laches is not a material issue if it be held that the decree in Wyoming determined the contract and the rights of the petitioner to the property in Montana as against those before the Court there. There was no showing that respondent suffered any damage by any delay which may have occurred after the entry of the decree in the Wyoming suit. There is therefore no basis for any such finding as the trial court made on the subject of laches.

10 *Ruling Case Law, Equity, Section* 143

McIntyre vs. Pryor, 173 *U. S.*, 38 (54)

Boatch vs. Boysen, 175 *Fed. 2nd*, 702 (707)

The money was paid by respondent Thelen with the knowledge of the claims of petitioner and prior to the trial of the suit in Wyoming, and at a time when that suit was pending. Furthermore respondent Thelen failed to disclose his interest in the trial at Wyoming though a witness there, and the complaint called for a disclosure of such property as the defendants, including Thelen, had in their possession to which petitioner

made claim, and the complaint described a portion of the lands here involved.

Not only had the expenditure been made by Mr. Thelen prior to the trial of the Wyoming suit, but during the year of 1931 and prior to the entry of the decree herein respondent had been repaid substantially all the money invested by him in the tax assignment certificates and the purchase at the decretal sale as shown by the figures set forth earlier in this brief.

Following the entry of the decree on December 11, 1931, an appeal was immediately taken to the Circuit Court of Appeals. This appeal was argued in January, 1933, and decided in the spring of that year, and shortly thereafter this action was commenced in June of that same year, 1933.

It should therefore follow that if the Wyoming Court had jurisdiction to render the decree that was rendered, petitioner asserted his claim to the land and cannot be charged with laches. This presents a Federal question for this Court to consider.

The Supreme Court of the State of Montana stated in its opinion—

> "As before stated, the main question here is whether the decree in the Wyoming Court was res adjudicata. The pleadings need not be analyzed in detail. It is sufficient to say that the pleadings therein on the part of plaintiff raised the question of the title and ownership of the land here involved. The answer of defendant Thelen in that action did not set forth the facts constituting his chain of title. It is contended by plaintiff that Thelen should have set forth his interest in and to the property in the Wyoming suit, and, not having done so, he is precluded from now asserting any interest therein.
>
> "There would be merit in plaintiff's contention if the Wyoming court had jurisdiction to litigate title to land in Montana. But it is firmly established that an action to determine title to or an interest in real estate is local and that courts of one state have no jurisdiction to litigate the title to lands in another state." (Tr. 677).

"Had Thelen set out his interest in the property in the answer in the Wyoming case, the court would not have acquired jurisdiction to adjudicate title to the Montana property. The Circuit Court of Appeals in Ferdig Oil Company vs. Wilson, 91 Fed. (2d) 857, held that since defendant Thelen filed an answer in the Federal Court in Wyoming, he submitted himself and his property rights to the jurisdiction of the court no matter where the property was situated. The authorities cited by the court in support of its conclusions are not in point and do not sustain the court's conclusion. We have not found any other authorities sustaining that view." (Tr. 678).

It is apparent that the Supreme Court of Montana would have reversed the trial court had it not adopted the wrong premise as expressed by the general rule affecting the jurisdiction of foreign courts over the subject of title to lands. The Court overruled the decision of the Circuit Court of Appeals in Ferdig Oil Company vs. Wilson, 91 Fed. (2nd) 857, and refused to recognize the validity of the Wyoming Court in the face of the plain language of the constitution of the United States. The Court failed to consider the exception to the general rule relating to the litigation of title to lands where is involved a contract, fraud or trust. This exception is specifically set forth in practically all of the cases cited by counsel, including Carpenter vs. Strange, 141 U. S. 87. This subject has been covered more extensively in the main brief of petitioner.

Counsel has evidently read only a part of Carpenter vs. Strange. He does not appear to appreciate the exception to the general rule therein clearly set forth. The question of laches therefore becomes a Federal question if the Wyoming decree ought to have been recognized as determining the contract, fraud and trust. If the record discloses no basis of fact for the decision of the State Court denying the Federal rights, it is the duty of this Court to review and correct the error.

Postal Telegraph Cable Co. vs. Newport, 247 *U. S.* 464 (473)

Ward vs. Love Co. 253 *U. S.* 17 (22)

The question of laches involves therefore the examination of the record which can more properly be considered after the issuance of the writ of certiorari.

Where laches operate to bar a claim a Court should consider whether an important witness has died, whether the property has increased in value, or has passed into the hands of an innocent party, or whether the condition of the parties has changed to the detriment of one.

> "The conclusion whether on the facts it would be inequitable to enforce the right and where the claimant is barred by laches involves a question of law."
>
> 10 *R. C. L., Sec.* 10146, *pg.* 400.

Upon the trial it developed that Ferdig who could have testified concerning the contract with Wilson died in August of 1931. His testimony would have been relevant under the Court's decision that the Wyoming Court was without jurisdiction. Ferdig, though living at the time of the trial of the Wyoming case and though served with the process and directly interested in the issues then being tried, nevertheless was not called as a witness and did not testify. There is no presumption that he would have denied the claim of petitioner had he been present at the trial of this cause. On the contrary, had it been held that the Wyoming decree was res adjudicata as to the fact of the contract, such testimony would not have been relevant and lapse of time would not have prejudiced this respondent.

As to other grounds tending to prove laches, the evidence shows re-payment before December, 1931 of most of the money invested by respondent and that there was no investment made after December 1931 by respondent. The record further fails to show any injustice or laches resulting in detriment to respondent between December, 1931 and June, 1933, or in fact at any other time. There is not a scintilla of evidence anywhere in the case that respondent suffered any damage by reason of any delay in bringing the Montana case.

Lack of knowledge is an excuse for delay in prosecuting a claim. It does not appear from the record that petitioner knew

of the alleged acquisition of the property by respondent prior to the commencement of the present action. It does appear, however, that respondent failed to disclose this fact in the trial of the Wyoming suit. (Tr. 353 to 355).

Mr. Thelen testifying in the Wyoming case as shown by the deposition of the Court reporter who took the testimony in the Wyoming case, stated that the Yellowstone Petroleum Company was formed after Mr. Ferdig went to Wyoming, and that it was Mr. Ferdig's desire that the stockholders of the Ferdig Oil Company should become stockholders of the Yellowstone Petroleum Company in order to recoup losses sustained in the Ferdig Oil Company. He testified:

> "A. Yes, and when started operating in Cody he (Ferdig) became disgusted with the oil fields in Montana—the wells were small and they were rapidly going down, he had one well that produced 1,000 barrels, and, over night, it turned to water.
>
> Q. That was known as No. 12?
>
> A. Yes, I think that flowed three or four months with oil, and it turned to water over night, and he drilled about 19 or 20 wells around there to find that same streak of oil, and he could not find it, they were all dry holes—and he became disgusted, and he came down into Wyoming, and got out into the Oregon Basin, and that looked like—he reported that the Ohio Oil Company had brought in an oil well of 20,000 barrels, and they had capped it, and I think some of the papers made quite a flurry about the big oil field out there, and he got interested with another man out there who had an old rig, and he wanted to get into this big production.
>
> Q. That is the Yellowstone Petroleum Company?
>
> A. The Yellowstone Petroleum Company. He then said to me 'These people in the Ferdig Oil Company are all good friends of mine. I would like to have them have an opportunity of turning their stock into the Yellowstone stock.'

Q. That is, exchange share for share?

A. 'And receiving therefor a share of Yellowstone stock for a share of the Ferdig Oil Company, and, in that way, they would be getting in on this fine thing down there, and I can make some money for them'; and that was the idea." (Tr. 145-146).

Had Thelen testified in the Wyoming Court at this time that he had within two weeks purchased the property of the Ferdig Oil Company at a decretal sale and had previously taken an assignment of tax certificates, and had Thelen disclosed that the wells in Montana were producing approximately four thousand barrels of oil per month and that a Refining Company owed the Ferdig Oil Company approximately twenty thousand dollars (which was subsequently paid to Thelen) the petitioner would have had knowledge of these facts, and it is not conceivable that he would have allowed any time to lapse in seeking to recover possession of these assets. The issues would have been litigated in Wyoming. Therefore it is inequitable for Thelen to now charge the petitioner with laches in a delay in bringing the action when he (Thelen) failed to make the disclosure of these facts in the Wyoming suit. His testimony was misleading and untrue. To give respondent the benefit of the defense of laches would be inequitable and laches is an equitable defense. Furthermore, the only pleading in the present suit with respect to laches is an allegation that this petitioner delayed for nine years in asserting any claim to the lands in question. (Tr. 85).

Laches being an affirmative defense must be pleaded and proved.

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